

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SUNNARUN KEO, et al.,)	
)	
Plaintiffs)	
)	
v.)	
)	
H. ROLLIN IVES, et al.,)	
)	
Defendants and)	
Third-Party)	
Plaintiffs)	Civil No. 90-0051 P
)	
v.)	
)	
LOUIS W. SULLIVAN, M.D.,)	
Secretary, United States)	
Department of Health &)	
Human Services,)	
)	
Third-Party)	
Defendant)	

**RECOMMENDED DECISION ON MOTION
OF THIRD-PARTY DEFENDANT TO DISMISS**

Louis W. Sullivan, third-party defendant and secretary of the United States Department of Health and Human Services ("HHS"), moves to dismiss this action on the ground of mootness.¹ In

¹ Upon reconsideration I denied the plaintiffs' motion to amend their complaint. See Memorandum Decision on Motions for Reconsideration and for Leave to File Amended Complaint. This recommended decision hence pertains to the plaintiffs' original complaint, filed February 26, 1990.

so doing, the Secretary effectively seeks dismissal for lack of subject-matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). For the reasons discussed below, I recommend that the motion be granted.

I. LEGAL ANALYSIS

The plaintiff class² contends that Maine violates federal law by delegating administration of the Additional Support for People in Retraining and Education ("ASPIRE") program to more than one state agency. *See, e.g.*, Complaint & 1. The ASPIRE program is designed to help recipients of food stamps and Aid to Families With Dependent Children ("AFDC") find stable work. *Id.* & 28. The plaintiffs suggest that the illegal operation of ASPIRE deflected funds from beneficiaries such as themselves. *Id.* & 67. They accordingly ask this court to order, *inter alia*, the recoupment of funds spent illegally so that those funds may be made available for the benefit of the plaintiff class. *Id.* & 68.

The plaintiffs bear the burden of proving the existence of subject-matter jurisdiction, *see, e.g.*, *Dalmau Rodriguez v. Hughes Aircraft Co.*, 781 F.2d 9, 10 (1st Cir. 1986), without which this court lacks all power to speak to the issues in this case, *see, e.g.*, 5A C. Wright & A. Miller, *Federal Practice and Procedure* ' 1350 at 194 n.2 (1990). The Secretary observes that the ASPIRE program was repealed and superseded following the filing of the instant complaint. He suggests that this court as a result may award neither injunctive nor retroactive monetary relief, rendering the entire action moot. *See, e.g.*, Memorandum of Third-Party Defendant Sullivan in Support of Suggestion of Mootness and in Opposition to Motions to Intervene and Motion for Leave to File Amended Complaint at 4-6. The plaintiffs concede the termination of ASPIRE. Plaintiffs' Reply Memorandum Regarding Third-Party

² The state defendants do not controvert the plaintiffs' class-action allegations. Complaint && 12-18; Defendants' Answer && 2-5.

Defendant's Suggestion of Mootness and Opposition to Motion to Amend at 1-2. They also acknowledge that the Eleventh Amendment bars the award of retroactive relief from the state's treasury. *Id.* at 2. However, they insist that relief yet may be awarded in this case through the tapping of the federal portion of AFDC funding. *Id.* at 2-3.

The plaintiffs persuasively argue the general proposition that the Eleventh Amendment does not necessarily bar the disgorgement of federal funds from states' hands; they nonetheless fail to carry their burden of demonstrating that such an award conceivably could be made in this case. The case on which the plaintiffs heavily rely, *Bennett v. White*, 865 F.2d 1395 (3d Cir.), *cert. denied*, 109 S.Ct. 3247 (1989), carves a narrow exception to the Eleventh Amendment bar against retroactive monetary relief. *Bennett* holds that a federal court may order state officials to award retroactive payments from segregable, available federal funds. *Id.* at 1408. *Accord Fernandez v. Chardon*, 681 F.2d 42, 59-60 (1st Cir. 1982), *aff'd*, 462 U.S. 650 (1983). The plaintiffs produce no evidence that any such segregable federal funds have made or will make their way into state officials' hands. The state of Maine can expect no reimbursement for funds allegedly illegally spent; if anything, it could expect the opposite. Congress has provided that HHS may either refuse to pay out or recoup federal matching funds for state AFDC programs administered in violation of federal law. *See, e.g.*, 42 U.S.C. ' ' 604, 608. Any award this court made against the state defendants hence would derive either from the state treasury or from intermingled state and federal funds, infringing the Eleventh Amendment. *See, e.g., Chardon*, 681 F.2d at 59-60. The plaintiffs suggest that this court might order HHS directly to make the desired reimbursement, ``for example, by requiring the doubling of the federal matching rate for the current employment program so that appropriated State monies would provide more services." Memorandum in Opposition to Third-Party Defendant's Motion for Reconsideration at 3. The plaintiffs cite no authority for this proposition; nor have they attempted to amend their complaint to assert such a claim

directly against third-party HHS. *See* Fed. R. Civ. P. 14(a). The Secretary argues convincingly that such relief would be barred not only by sovereign immunity, Response of Third-Party Defendant Sullivan to Plaintiffs' Reply Memorandum Regarding Third-Party Defendant's Suggestion of Mootness and Opposition to Motion to Amend at 5-6, but also by the statutory scheme of AFDC, *id.* at 9. In sum, the plaintiffs fail to carry their burden of demonstrating the justiciability of their claim. The court lacking subject-matter jurisdiction to hear the case, it must be dismissed.

II. CONCLUSION

For the foregoing reasons, I recommend that this court *GRANT* the motion of the third-party defendant to dismiss the plaintiffs' complaint.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 3rd day of April, 1991.

*David M. Cohen
United States Magistrate Judge*